Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HAROLD KLAPPER,

Petitioner,

v.

CHRISTOPHER CONNELLY, MORGAN STANLEY, DW, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a Circuit Court affirms a dismissal by the district court of a Motion to set aside a decision of an arbitration panel of the National Association of Securities Dealers ("NASD") when that decision against Petitioner was achieved in violation of almost all his constitutional rights; in the process affirming (unpublished and looking away), this undisputed Record conclusion, made worse by both the assigned District Court Judge and referred to Magistrate Judge, not only condoning said abuse, but adding to it with intent and malice; and when from the start of the NASD proceeding throughout the entire federal judicial process, at no time did appellees or their counsel dispute a single sworn to Record and documentary proof - indeed to avoid perjury refusing to put in any affidavits - should, for the reasons set forth *infra* - this Court grant a writ of Certiorari.

LIST OF PARTIES

Petitioner is Harold Klapper.

Respondents are Morgan Stanley DW, Inc., and Christopher Connelly.

TABLE OF CONTENTS

Page

Questions Presented.....i

List Of Parties ii

Table Of Contents.....iii

Table Of Cited Authorities iv

Table of Appendices.....vii

Opinions Below 1

Statement Of Jurisdiction.....1

Statutes, Rules and Regulations Involved.....1

Statement Of The Case 3

Reasons For Granting The Writ.....5

I. The Constitutionally Prohibited Race Baiting.....5

II. The Departure From The Usual And Accepted Course Of Judicial Proceedings By the Eleventh Circuit Thereby Condoning The Corrupt Behavior Of the District Court and Magistrate Judge 11

III. The Blatant Error In Applying Discretion In Denying Pendant Jurisdiction.....15

Conclusion 17

TABLE OF CITED AUTHORITIES

CASES *Page*

Creative Tile Marketing v. Siers International,
922 F.Supp. 1534 (S.D.Fla. 1996) 15

Donarie M.D. v. NME Hospital, Inc.,
27 F.3d 507 (11th Cir 1994) 9

Grispino v. Mut. Life Ins. Co.,
358 F.3d 16 (C.A. 1st 2003) 7

Keevan & Sons v. Collier Steel Pipe & Tube,
107 F.R.D. 665 (S.D. Fla. 1985) 15

Kruse v Sands Brothers & Co.,
226 F. Supp 2d. 484, 485-6 (SDNY 2002) 12

LeBlanc-Sternberg v. Fletcher,
781 F. Supp 261 (SDNY 1991) 9-10

O.R. Securities, Inc. v. Professional Planning Assoc.,
857 F.2d 742, 745-6 (11th Cir. 1988) 11

Saint Francis College v, Alkhazraji,
481 U.S, 604, 613, 95 L. Ed.2d 582,
107 S. Ct. 3244 (1987) 9

Singer v. Denver School District,
959 F. Supp 1325, 1331 D. Colo 1987) 9

Cited Authorities

Solaroff Shade and Shutter v. Bio-Energy Systems,
803 F.2d 1130 (11th Cir. 1986) 15

Stern V. Farmers Group of Companies,
78 Fed. Appx. 519 (C.A. 9th 2003).....17

Tamiami Partners v. Miccosukee Tribe,
177 F.3d 1212 (11th Cir. 1999) 16

U.S. Ship Management Inc. v Maersk Line, LTD.
188 F. Supp 2d. 358, 362-3 (SDNY), *aff'd*,
51 Fed Appx 66 (2002) 11-12

Waldron v Ratzler, 862 F. Supp, 767,
768-9 (S.D.N.Y. 1994) 11

Weiss v. La Suisse,
131 F. Supp 2d. 446 (SDNY 2001) 8-9

Western Employer Ins. v Jeffers,
958 F.2d 258, 260-01 (9th Cir. 1992) 11

STATUTES AND RULES

28 U.S.C.§ 1331 2

42 U.S.C.§ 1981 2-3

Federal Arbitration Act,
9 U.S.C.A. 2002 *et seq*,
§§ 9, 10, 12 and 13 .....2, 3

Supreme Court Rule 10(a) 5, 12, 16

Supreme Court Rule 10(c) 5

United States Southern District
Rule 4(b) 14

Magistrate Judge Rules of the United States District Court for the Southern District of Florida,
Rules 1-3, 4 ((a) and (b) 12, 13

OTHER AUTHORITIES

Webster's New International Dictionary
(2nd Ed.Unabridged, Nelson, Ph.D. Editor in Chief, G&C. Merriam Co. 1958). 5-6

The New Shorter Oxford English Dictionary (Clarendon Press. Oxford, "this edition 1993") ...6

TABLE OF APPENDICES

Appendix A – Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed March 2, 2005 .....1a

Appendix B – Final Judgment Adopting Magistrate Judge's Report And Recommendations Court Of Appeals For The Eleventh Circuit Filed August 11, 2004 .....4a

Appendix C – Report And Recommendation Filed June 14, 2004 .....6a

Appendix D – Order of the Magistrate Filed March 30, 2004 .....19a

Appendix E – Order Of Reference of the District Court Filed August 18, 2003 .....22a

Appendix F – Sigma Delta Chi First Amendment Award For Immediate Release 8/26/2004 .....24a

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, affirming the district court dismissal, entered on March 2, 2005, is not published by order of said Court, and is included as Appendix A hereto.

The District Court's judgment affirming the Magistrate Judges Report and Recommendation, entered on August 11, 2004, is included as Appendix B hereto.

The Magistrate's Report and Recommendation, entered on June 14, 2004, is included as Appendix C hereto.

The Order of the Magistrate entered on March 30, 2004, is included as Appendix D hereto.

The Order of reference of the District Court referring the matter to the Magistrate, entered on August 18, 2003, is included as Appendix E hereto.

STATEMENT OF JURISDICTION

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

The opinion of the Eleventh Circuit Court of Appeals, which is the judgment sought to be reviewed, was entered on March 2, 2005. (Appendix A).

STATUTES INVOLVED

The underlying litigation involves an arbitration of the National Association of Securities Dealers ("NASD") dismissing Petitioner's claims against Appellees for their hideous failure to

advise him on his securities placed with them, thus causing him gigantic loss, all of which could have been avoided.

This happened during the anything goes years before the stock market "bubble" burst.

(1): NASD, in the pocket of the one powerful Appellee and its powerful law firm, not only decided against Petitioner, but abused him personally and contextually, all in violation of the United States Constitution. (2): Below, in the District Court, two federal Judges (one Magistrate), not only allowed this to continue, condoning the NASD egregiousness, but joined in. (3): The Eleventh Circuit not only looked the other way, but denied the undeniable - there was no fact opposition at any stage by Appellees, let alone under oath or certified - but stated Petitioner's position with regard thereto was "frivolous".

The following statutes were violated: 28 U.S.C.§ 1331 and 42 U.S.C.§ 1981; and, federal constitutionally defined "supplemental jurisdiction"; Federal Arbitration Act, 9 U.S.C.A. 2002 *et seq*, §§ 9, 10, 12 and 13.

28 U.S.C.§ 1331 provides:

> The district court shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

42 U.S.C.§ 1981 provides:

> **Equal Rights under the law**
> **(a) Statement of equal rights**
> All persons within the jurisdiction of the United States shall have the same

> right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens....
>
> **(b) `Make and enforce contracts' defined**
>
> For purposes of this section the term "make and enforce contracts" includes the making, performance, modification ... of contractual relationship
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by non governmental discrimination and impairment under color of State law.

FFA § 12 provides:

> **Notice of Motions to vacate...service....**
>
> Notice of a motion to vacate...an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in the same court.

STATEMENT OF THE CASE

Once the NASD proceeding began, the Panel under the aegis of its chairman, denied Petitioner all his rights, accusing him of not being a conformist member of the "tribe." This violation of Petitioner's rights under the above statutes continued

unabated throughout the arbitration, and after.

On the merits, Appellees presented not a single fact or witness in opposition to Petitioner's claims for monetary damages; the Panel constantly ridiculed Petitioner; physically intimidated him; sat silent while counsel for both Appellees reaffirmed a prior bribe offer; and, ran out at the end of the second and final day of the hearing, leaving one Panel member who, in the presence of Petitioner, alone and packing his cartons, laughed at what they - Panel - Appellees - Appellee's Counsel - had done: the ridicule on the above racial grounds, unabated.[1]

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[1]When Petitioner filed his massive under oath Motion in the District Court to set aside the NASD award under the above statute, twice Appellees defaulted; then when the District Judge allowed Appellees more time, by making a legally unheard of reference to the Magistrate Judge under these facts: Appellees finally moved without affidavit to set aside the Default upon grounds not a single Court in the history of federal jurisprudence has ever accepted; and, the Magistrate Judge decided in Appellees favor, notwithstanding Petitioner's setting forth the law.

Then, when Petitioner appealed the Magistrate Judge's decision dismissing for failure [sic] to properly serve, this time reviewing the entire body of federal law regarding same and its underlying philosophies - hardly necessary - asking the District Court how the Magistrate Judge's decision could even have occurred - the District Court Judge, ignoring the rules governing references to magistrate judges, literally sneaked the matter back to him so the docket would not show this reference.

This time, the Magistrate Judge acknowledged error, saying he misread both side's legal presentations - there was none by the Appellees other than the terse egregious wrong by Appellees' counsel - he then interjected himself as though a party with personal participation in the facts, and decided against Petitioner on the racial issues, ignoring the total non- opposition to same, left alone under oath.

The District Court went along - no surprise - and the Eleventh Circuit – in an obvious use of its power not to publish - totally and erroneously both missed and ignoring the facts - And affirmed.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10(a) states that the Supreme Court will exercise its discretion and review a writ when a United States Court of Appeals has entered a decision in conflict with the decision of another Court of Appeals on the same important matter, or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Supreme Court Rule 10(c) states that the Supreme Court will exercise its discretion and review a writ when a United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court.

Petitioner suggests this discretion should, therefore, be exercised.

I. THE RACE BAITING

At the first NASD pre-Hearing conference Judge Breger the chairman, said: "You live alone don't you Mr. Klapper?"[2]

The term **Tribe** means Jew:

> **tribe**...1. A social group compromising a series of families, clans, generations, or generations... as the twelve *tribes* of Israel, traditionally descended from the twelve tribes of Jacob. Anthropologists generally treat the

[2]His tone was sinister, his intent *Tribal*, his prejudice overt. This was the just the beginning.

> *tribe* as a (putatively) consanguineous endogamous sibs...often with a special tribal worship.
> *Webster's New International Dictionary* (2nd Ed. Unabridged, Neilson, Ph.D. Editor in Chief, G&C. Merriam Co. 1958)[1] (at 2707; emphasis original).*[3]

> **tribe**...1. a group of...families, claiming descent from a common ancestor, sharing a common culture, religion...Orig. spec. (*Jewish Hist.*) each of the twelve divisions of the Israelites claiming descent from the twelve sons of Jacob.
> *The New Shorter Oxford English Dictionary* (Clarendon Press. Oxford, "this edition 1993") (at 3387;emphasis original).**[3]

Among the other proofs (sworn to and uncontested) in the Record before the Eleventh Circuit are:

the Panel attempted to intimidate Petitioner from representing himself, made worse by the fact that by that time the record before NASD showed Appellees' desperation in the process;

the Chairman denied Petitioner all NASD pre-hearing discovery, including refusing to decide several requests until Petitioner served notice to the NASD by certified mail;

the Appellees via their counsel bribed the Panel at the very beginning of the hearing when it was being taped. He

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[3]"*" "**" along with the *Oxford Unabridged Dictionary*, the three great dictionaries in English of English.

opened in an authoritative voice - Petitioner still hears, - reminding the Panel that the role of NASD was to protect "Capitalism" "The member brokerage houses" "If Claimant prevails, four thousand to five thousand Claims will be encouraged, threatening everybody."[4];

the Chairman taunting Petitioner: "Mr. Klapper, I hate Lou Dobbs, I *always* turn to the local news. I won't use him." This was Judge Breger saying again you are not one of us. (In the morning of the second hearing day, he said to Petitioner, "You went to Beach High didn't you?" "No, Miami High." He turned away in disgust. In his world one is not an American; rather born a member of the *Tribe* - his way or pay the consequences - . His two Panel colleagues were in accord);

arbitrator Ainbinder, always screaming and shouting at Petitioner, cutting Petitioner off; and, toward the end smirking, saying only Morgan Stanley is responsible here; then, finally, as Petitioner was preparing for summation, screaming one more time telling Petitioner to stop working on his documents;

at the of the Hearing, the chairman insisting, on the record, Petitioner say on the Record that the Panel did a good job; then he led a race from the hearing room before Petitioner

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[4]In the Record below is uncontested proof Petitioner legally got into the arbitration showing Morgan Stanley's corruption in this matter starting from when he was first a client, and continuing through the NASD and the District Court and before the Magistrate (and condoned by the Eleventh Circuit), including Morgan Stanley's game plan in all NASD litigations to destroy and hide evidence.

could get a post-hearing brief submission schedule (previously ordered at Petitioner's insistence);

the detailed involvement of the NASD assigned officer pressuring Petitioner to submit a laudatory evaluation of the Panel to NASD national headquarters before the Panel decided, with a copy to her -all in violation of NASD Rules - which led immediately to the unanimous decision for Appellees.

There is much more, all documented and under oath, all in the Record below and not contested by Appellees.

Where a Jew/ ak/a "tribe" member is discriminated against - Petitioner's facts - there is federal subject matter jurisdiction under these United States Code provisions because he is considered non-white. *Weiss v. La Suisse*, 131 F. Supp 2d. 446 (S.D.N.Y. 2001). There, the Court held:

> "To establish a [cause of action] under § 1981 a plaintiff must allege sufficient facts to support the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race....
>
> "I held in my earlier opinion that as Jews, plaintiffs satisfy the first factor. *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 618...(1987)". (at 448)
>
> * * *
>
> "To satisfy the second element, a plaintiff must `specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of a racially discriminatory intent.'"(at 449)

* * *

> "[C]ivil rights complaints are to be liberally construed....
> `[T]he real question is whether the complaint alleges sufficient facts to raise an inference of racial motivation.'" (at 450)

Accd, Donarie M.D. v. NME Hospital, Inc., 27 F.3d 507 (11th Cir. 1994), where a Jew's "allegations that he or she was subjected to intentional discrimination because of his or her `ancestry or ethnic characteristic' satisfies the pleading requirements of section 1981 [5]. *Saint Francis College v, Alkhazraji*, 481 U.S, 604, 613, 95 L. Ed.2d 582, 107 S. Ct. 3244 (1987).

Singer v. Denver School District, 959 F. Supp 1325, 1331 (D. Colo 1987), cites to *Shaare* for the holding that Jews are a distinct race for civil rights, and discrimination against Jews is actionable under § 1981.

LeBlanc-Sternberg v. Fletcher, 781 F. Supp 261 (S.D.N.Y. 1991) leave no doubt:

> CIVIL RIGHTS CLAIMS
>
> 1. *Sections 1981 AND 1982*
>
> In their amended complaint, plaintiffs allege that the defendants violated their property and housing rights in violation of 42 U.S.C.§ 1981 and 1982. Defendants contend that these statutes were directed at discrimination based upon race, not religion,

[5]Which section applies to the present case.

> and as a result, plaintiffs have failed to state a claim upon which relief can be granted. [United States Supreme Court citations omitted].
>
> The gravamen of the complaint is that the defendants undertook their actions in order to achieve their discriminatory goals against Orthodox Jews. The defendants do not dispute the fact that Jewish people entitled to the protection of § 1981 and 1982. [citing *Shaare*]. However defendants argue that their alleged discriminatory acts were addressed solely to the plaintiffs' lifestyle....
>
> The complaint does assert that the plaintiffs suffered discrimination because they were Orthodox Jews. However, that makes no difference. Sections 1981 and 1982 were intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. [citing *Saint Francis*]. Because Jewish culture, ancestry, and ethnic identity are intricately bound up with Judaic religious beliefs, racial and religious discrimination against Jews cannot be as easily distinguished as defendants would have it [citations omitted]. Moreover, the Supreme Court has explicitly stated that Jews are entitled to the protections of §§ 1981 and 1982 because Jews were considered to be a separate race in 1870 when these statutes became law. *Shaare*....We need not inquire any further. (at 267-8).

See also, *Waldron v Ratzler*, 862 F. Supp, 767, 768-9 (S.D.N.Y. 1994).

To all of this the Eleventh Circuit found:

> Klapper argues that he pleaded a 42 U.S.C. section 1981 civil rights claim in his motion to vacate, but the motion does not lend itself to such a reading. The comments of the arbitrator about which Klapper complained also cannot be construed in any way as evidencing racial animus" (Appendix A, at 4a).[6]

Petitioner submits that under the above this Courts Rule 10 (a) and (c), warrant the grant.

II. THE DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY THE DISTRICT COURT AND THE MAGISTRATE JUDGE SANCTIONED BY THE ELEVENTH CIRCUIT

The Magistrate first dismissed Petitioner's case below for failure to properly serve the Motion that necessarily starts an appeal from a NASD arbitration. (Appendix D). Therein he adopted the twice in default position of Appellees that service should ignore the laws of Congress which provide for how such Motion should be served, and used the Federal Rules of Civil Procedure, even though the Motion papers of Petitioner showed exactly how service is to be done. A party seeking to vacate an arbitration award *never* commences a federal action by Complaint (or uses method(s) for service of same.) See the leading case, *O.R. Securities, Inc. v. Professional Planning Assoc.*, 857 F.2d 742, 745-6 (11th Cir. 1988); *Accd, Western Employer Ins. v Jeffers*, 958 F.2d 258, 260-01 (9th Cir. 1992);

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[6]Normally, an opinion says the full name and then (hereinafter "Klapper"). Not so with Appendix A; "Klapper". It is a revealing act.

U.S. Ship Management Inc. v Maersk Line, LTD; 188 F. Supp 2d. 358, 362-3 (S.D.N.Y.), *aff'd,* 51 Fed Appx 66 (2002). *See also, Kruse v Sands Brothers & Co.*, 226 F. Supp 2d. 484, 485-6 (S.D.N.Y. 2002).

The only explanation for such behavior by the Magistrate Judge is that he was seeking to save Appellees not only from default, but certain defeat on the merits.

When Petitioner objected to Appendix D before the District Court, the Judge, as stated, sneaked the case back to the Magistrate in violation of Rule 4 of the Magistrate Rules of the Southern District of Florida, although once objections were filed, jurisdiction resided solely with the District Court. This thus violation of Rule 10(a) of the Supreme Court became geometric, since now, not only was the District Court not deciding the clear issues of service, - Appellees' default, and their NASD no defenses to the merits, - but the District Judge was depriving the docket sheet of a paper trail of same, because now the Magistrate Judge could decide again as though he, and only he, reviewed Petitioner's Objections to Appendix A.

Thus, the Magistrate Judge issued Appendix C. Here, departures from the standards of 10(a) continued with greater blatancy.

The Magistrate Judge admitted he decided in error on service; again misconstruing the law, in the process claiming he was now reviewing again the issue; accepts that service was good while double talking the law and Appellees' shockingly

mendacious excuse for default without affidavit, again contrary to all law; finds no diversity jurisdiction, although Petitioner repeatedly said he never claimed such; ignores all law on the racial standards, while by osmosis, totally factually incompetently, injects himself as a participant in the NASD hearing - although the Appellees made no fact objection to Petitioner's sworn to affidavit accompanied by exhibits in the hundreds of pages; then finally, sets forth a briefing objection schedule to Appendix C, which, unless Petitioner could move with incredible, speed - he did - would have amounted to a procedural lynching.

As to all of this, the District Judge agreed. (Appendix D).

Here, regarding the above, is how Petitioner further argued in his briefs below without contestation:

Under the Magistrate Judge Rules of the United District Court for the Southern District of Florida, Rules 1-3, the District Judge assigned. Under Rule 4 ((a) and/or (b)), the Order of the Magistrate Judge Turnoff was then before the District Court for "REVIEW AND APPEAL". This included the full Motions For a Default. The Magistrate should have decided every ground those Motions raised, especially in the alternative, in his capacity as a magistrate judge, because his basis for first holding non-valid service was nonexistent; but rather in egregious defiance of all United States statutory and federal court law.

This conclusion was more so because neither Appellees - nor anyone on their behalf - put in any affidavits opposing. They

cited to no law in their so-called Memoranda on point on any issue raised by Petitioner, Movant below, and ignored every single issue, especially the statutory and case law on racism, applicable to the facts.

The Magistrate Judge in his FINAL REPORT AND RECOMMENDATION (Appendix C) deprived Petitioner of his constitutional right to a reasonable time to file OBJECTIONS.

He stated:

> Pursuant to S.D. Fla, Magistrate Rule 4(b), the parties may serve written objections with the Honorable Shelby Highsmith...**on or before June 21, 2004**. Any response...**on or before July 6, 2004**.
> Failure...shall bar the parties from attacking on appeal any factual findings contained herein." (bold in original). (at 25a).

Rule 4(b) of the rules of Southern District of Florida provides time to object to a Magistrate Judge's Report is 10 days after being served, unless the Magistrate or District Judge allows otherwise.

Petitioner received Appendix C on June 17, 2004, it being mailed June 16th. Thus the Magistrate Judge gave Petitioner three days (He could not risk drafting on the filing date, plus two of the three days were a weekend.)

To the Magistrate Judge's diabolical claim that his ruling on time applies to all "The parties": No it did not. Why would Appellees object to Appendix C? Answer: they would and did not. So, then they had fifteen days to "respon[d]" to Petitioner's

papers.

As regards Appellees' excuse for twice defaulting, their non-affidavit position is contrary to the universal practice in the federal courts and the Eleventh Circuit. *Keevan & Sons v. Collier Steel Pipe & Tube*, 107 F.R.D. 665 (S.D. Fla. 1985). *Accd, Solaroff Shade and Shutter v. Bio-Energy Systems*, 803 F.2d 1130 (11th Cir. 1986). *See also, Creative Tile Marketing v. Siers International*, 922 F.Supp. 1534 (S.D.Fla. 1996).

That the District Judge affirmed adopting every position of the Magistrate Judge should not surprise. There was no basis to make a reference (Appendix E) in the first place. The District Judge remained silent while the Magistrate Judge held the referral six months - five months beyond the mores of the Southern District of Florida - . Then, confronted by Petitioner's irrefutable position, when once at last he had to decide on the Magistrate Judge's unsustainable decision, contrary to his own practice as a federal judge, where always he mailed his opinions to counsel, he did not do so with Appendix B. As Petitioner made clear to the Eleventh Circuit, the thirty days to appeal is jurisdictional; and, this failure to mail by the District Court could not have been accidental.

III. PENDANT JURISDICTION

Usually, the failure of a Circuit Court to apply established jurisprudence, especially its own, is not a ground for a review by writ. But here, the Eleventh Circuit not only ignored its own jurisprudence, but its own Circuit leading case involving

the same District Judge as involved here. Stronger, as with most of the other areas presented by this case: every judge: Magistrate, District Judge, the three Judges of the Eleventh Circuit, - they all ignored the law.

If, as Petitioner believes, the reason self-evidently, was to ignore the rights of Petitioner, than here too, Rule 10(a) should invoke the writ.

Tamiami Partners v. Miccosukee Tribe, 177 F.3d 1212 (11th Cir. 1999), is the leading authority of the Eleventh Circuit. Brilliant jurisprudence, it held:

> The issue of whether the district court had subject matter jurisdiction over Tamiami's complaint....According to the defendants, [Tribe] these counts merely address contract and arbitration disputes arising under the Agreement. They argue that such disputes do not raise a federal question....
>
> It is well-settled that parties cannot create subject matter jurisdiction....an agreement to arbitrate without more does not raise a federal question....[T]he Federal Arbitration Act alone is insufficient to confer federal jurisdiction over disputes involving arbitration agreements, and that an independent basis of jurisdiction such as diversity or a federal question is required. In this case, however, we find...Tamiami's complaint present[s] more than a mere dispute concerning a contract or an agreement to arbitrate. Each of those counts-at least in part-concerns the arbitration of Tamiami's claims that the Tribe had an obligation to process...applications of Tamiami in good faith, and that the Tribe breached its obligation when, it rejected these license applications for the sole purpose of taking

over....(at 1222).

Moreover, a federal court's right to discretion, is not the right to be arbitrary. It must not be abused. In Petitioner's case, the failure to take pendant or supplemental jurisdiction, was abusive, intentional and wrong. *See, Grispino v. Mut. Life Ins. Co.*, 358 F.3d 16 (C.A. 1st 2003); *Stern V. Farmers Group of Companies*, 78 Fed. Appx. 519 (C.A. 9th 2003).

Finally, petitioner is constrained to point out that the Eleventh Circuit (Appeals Panel and District Judge), in a case factually disparate from Petitioner's, engaged in similar outrageous departures from responsibility; but, fortunately, an alert member of the media caught it; and, there was no subsequent need for seeking a writ of Certiorari. (*see*, Appendix F)

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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